Public Prosecutor v Muhammad Taufik Hidayat (W/Indonesia)

HIGH COURT (ALOR SETAR) — CRIMINAL TRIAL NO 45A-02–01 OF 2015
CHOO KAH SING JC
28 DECEMBER 2016

Criminal Law — Dangerous drugs — Trafficking — Accused charged for trafficking methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same — Whether prima facie case proven — Whether accused had knowledge of drugs found — Whether accused innocent carrier — Whether case proven beyond reasonable doubt — Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a) & (2)

The accused was charged with the offence of trafficking methamphetamine ('the drug'), an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') and punishable under s 39B(2) of the DDA. Based on the evidence of the custom officers ('SP4, SP6 and SP8'), the investigating officer ('SP10'), the chemist ('SP3') and the science officer ('SP5'), the prosecution's case was that, the accused was trafficking the drug when SP4 and SP6 found the said drug concealed inside the sidewall of a brown bag ('P6') and a black bag ('P21') and also inside the heels of four pairs of women shoes (P22, P23, P24, P25, P26, P27, P28 and P29) carried by the accused. The accused main defence was that he was an innocent carrier and he had no knowledge that the drugs were concealed in P6, P21 and the women shoes. He submitted that these items belonged to one Iwan who was the actual trafficker. The issues for consideration were: (a) whether the accused suspected the fact that the drugs were hidden in P6, P21 and the women shoes; and (b) whether the accused could have realised the probability that the drugs were hidden in P6, P21 and the women shoes, and yet, he refrained from obtaining the final confirmation.

Held, discharging and acquitting the accused:

(1) Based on the evidence, the accused was seen carrying P6 which contain P21 and the women shoes. The drugs were found concealed in P6, P21 and the women shoes which showed that the accused had custody and control over the drugs. Thus, pursuant to s 37(d) of the DDA, the accused shall be deemed to have been in possession of the drugs. As the accused was caught in the act of carrying P6, P21 and the women shoes where the drugs were found and that the total weight of the drugs were 2,081.84g, the accused was in fact in the act of trafficking as envisaged in the definition of s 2 of the DDA. Further, SP3 confirmed that the

substances found in P6, P21 and the women shoes were methamphetamine which was listed in Part III First Schedule of the DDA. The court also satisfied that there was no gap in the chain of evidence. Based on the findings, the prosecution had made out a prima facie case against the accused (see paras 46–55).

(2) SP8 agreed that P6 looked normal. This could be a fact that it did not cross the mind of the accused that there could be something hidden in P6. The weight and look of P6 did not raise the suspicions of the accused. There was insufficient evidence to show that the accused could have suspected the fact that incriminating drugs were hidden in P6, P21 and the women shoes, and yet the accused refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. In the absence of such evidence, the accused could not have asked further, or inspected or examined P6, P21 and the women shoes. Based on the findings, the accused's plea that he was an innocent carrier had been made out. Further, in light of the defence's narrative, the dependence on the principle of wilful blindness could not sustain in the prosecution's case (see paras 80 & 83–84).

(3) SP10 agreed that the investigation was incomplete. Based on the evidence, the investigation carried out by SP10 on the women shoes was not detailed enough in that the prosecution's witness testified that there were no price tags on the women shoes but on the observation by the court, three out of four pairs of the women's shoes have price tags on them. The discrepancy in the description of the women's shoes affect the identity of the items in which some of the drugs were found concealed. On totality of the evidence, there was reasonable doubt on the prosecution's case (see paras 96, 99 & 101).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana kesalahan mengedar methamphetamine ('dadah tersebut'). Satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan boleh dihukum di bawah s 39B(2) ADB tersebut. Berdasarkan keterangan pegawai kastam ('SP4, SP6 dan SP8'), pegawai penyiasat ('SP10'), ahli kimia ('SP3') dan pegawai sains ('SP5'), kes pendakwaan adalah bahawa, tertuduh telah mengedar dadah tersebut apabila SP4 dan SP6 menjumpai dadah tersebut tersembunyi dalam bahagian tepi beg berwarna coklat ('P6') dan beg berwarna hitam ('P21') dan juga di dalam bahagian tumit empat pasang kasut wanita (P22, P23, P24, P25, P26, P27, P28 dan P29) yang dibawa oleh tertuduh. Pembelaan utama tertuduh adalah bahawa dia seorang pembawa yang tidak bersalah dan dia tiada pengetahuan bahawa dadah tersebut disembunyikan dalam P6, P21 dan kasut-kasut wanita itu. Dia berhujah bahawa barangan tersebut dimiliki oleh Iwan yang merupakan pengedar sebenar. Isu-isu untuk dipertimbangkan adalah: (a) sama ada tertuduh mensyaki fakta bahawa dadah tersebut disembunyikan dalam P6,

P21 dan kasut-kasut wanita itu; dan (b) sama ada tertuduh boleh menyedari kebarangkalian bahawa dadah tersebut telah disembunyikan dalam P6, P21 dan kasut-kasut wanita itu, dan masih, dia menahan dirinya daripada mendapatkan pengesahan akhir.

Diputuskan, melepaskan dan membebaskan tertuduh:

(1) Berdasarkan keterangan, tertuduh dilihat membawa P6 yang mengandungi P21 dan kasut-kasut wanita itu. Dadah tersebut didapati disembunyikan dalam P6, P21 dan kasut-kasut wanita itu yang menunjukkan bahawa tertuduh mempunyai jagaan dan kawalan ke atas dadah tersebut. Oleh itu, menurut s 37(d) ADB, tertuduh hendaklah dianggap mempunyai milikan dadah tersebut. Oleh kerana tertuduh ditangkap semasa melakukan perbuatan membawa P6, P21 dan kasut-kasut wanita itu di mana dadah tersebut dijumpai dan bahawa keseluruhan berat dadah tersebut adalah 2,081.84g, tertuduh sebenarnya melakukan perbuatan mengedar seperti termaktub dalam tafsiran s 2 ADB. Selanjutnya, SP3 mengesahkan bahawa bahan yang dijumpai dalam P6, P21 dan kasut-kasut wanita itu adalah methamphetamine yang disenaraikan dalam Bahagian III Jadual Pertama ADB. Mahkamah juga berpuas hati bahawa tiada jurang dalam rantaian keterangan. Berdasarkan penemuan itu, pendakwaan telah membuktikan kes prima facie terhadap tertuduh (lihat perenggan 46–55).

(2) SP8 bersetuju bahawa P6 kelihatan biasa. Ini boleh menjadi suatu fakta bahawa ia tidak terlintas di fikiran tertuduh yang sesuatu disembunyikan dalam P6. Berat dan rupa P6 tidak menimbulkan syak wasangka terhadap tertuduh. Keterangan tidak mencukupi untuk menunjukkan bahawa tertuduh boleh mensyaki fakta bahawa dadah yang dituduh itu disembunyikan dalam P6, P21 dan kasut-kasut wanita itu, dan malah tertuduh menahan diri daripada mendapatkan pengesahan muktamad kerana dia ingin untuk dapat menafikan pengetahuan. Dalam ketiadaan keterangan sedemikian, tertuduh tidak boleh bertanya selanjutnya, atau menyiasat atau memeriksa P6, P21 dan kasut-kasut wanita itu. Berdasarkan penemuan tersebut, pli tertuduh bahawa dia adalah pembawa yang tidak bersalah telah dibuktikan. Selanjutnya, berdasarkan naratif pembelaan, kebergantungan pada prinsip kejahilan yang disengajakan yang tidak boleh dikekalkan dalam kes pendakwaan (lihat perenggan 80 & 83–84).

(3) SP10 bersetuju bahawa siasatan adalah tidak lengkap. Berdasarkan keterangan, siasatan yang dijalankan oleh SP10 ke atas kasut-kasut wanita itu tidak cukup terperinci di mana saksi pendakwaan memberi keterangan bahawa tiada tanda harga pada kasut-kasut wanita itu tetapi setelah diteliti oleh mahkamah, tiga daripada empat pasang kasut-kasut wanita itu mempunyai tanda harga padanya. Percanggahan dalam

keterangan kasut-kasut wanita itu menjejaskan identiti barangan tersebut di mana dadah tersebut ditemui telah disembunyikan. Berdasarkan keseluruhan keterangan, terdapat keraguan munasabah terhadap kes pendakwaan (lihat perenggan 96, 99 & 101).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 815–975.

Cases referred to

Deon Jacobus Alfred Cornelius v PP [2016] MLJU 1564; [2016] 1 LNS 354, CA (refd)
Hoh Bon Tong v PP [2010] MLJU 2184; [2010] 5 CLJ 240, CA (refd)
Ismayilova Namid Qizi Irada v PP [2016] MLJU 1565; [2016] 1 LNS 20, CA (refd)
Marimuthu a/l Seringan v PP [2016] MLJU 1561; [2016] 1 LNS 64, CA (refd)
Mohamed Hasrool bin Mohamed Najri v PP [2016] MLJU 1562; [2016] 1 LNS 300, CA (refd)
R v Briscoe 2010 SCC 13 (refd)
Saied Zoujhi Eisa v PP [2016] MLJU 1563; [2016] 1 LNS 301, CA (refd)

Legislation referred to

Criminal Procedure Code ss 180(3), (4), 182A(2), (3)
Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), (2), First Schedule, Part III

Izhanudin Alias (Suhana Mohd with him) (Legal Officer, Royal Malaysia Customs Department) for the prosecution.
Loke Kok Mun (Gooi & Azura) for the accused.

Choo Kah Sing JC:

INTRODUCTION

[1] Muhammad Taufik Hidayat, the accused, was charged with trafficking 2,081.84g of methamphetamine, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), which if convicted is punishable under s 39B(2) of the same Act which carries mandatory death sentence.

[2] The charge reads as follows:

Bahawa kamu pada 5 Ogos 2014, lebih kurang jam 2.30 petang, di Unit Pemeriksaaan Penumpang Bas/Pejalan Kaki, Kompleks Imigresen, Bukit Kayu Hitam dalam Daerah Kubang Pasu, dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu methamphetamine sejumlah 2,081.84 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen

A 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE PROSECUTION'S CASE

B **[3]** The prosecution called 11 witnesses. The narrative of the prosecution's case began with the testimonies of SP4 and SP6. SP4 and SP6 were the customs officers who were assigned at the customs check point at the immigration complex at Bukit Kayu Hitam at the material time.

C **[4]** On 5 August 2014, about 1.30pm, SP4 saw a man carrying a brown colour bag ('P6') walking to the immigration check-point. SP4 instructed the man to place P6 into the scanning machine.

D **[5]** Upon scanning P6, SP4 saw an image from the monitor screen which raised her suspicion. She then instructed the man to place P6 on the inspection counter for physical examination. She also instructed the man to produce his passport for verification. The man was later identified as the accused.

E **[6]** SP4 instructed the accused to open P6 for inspection. The accused told SP4 that P6 contained women's shoes. When P6 was opened, SP4 saw a black bag ('P21') inside P6.

F **[7]** SP4 then instructed the accused to open P21 for inspection. Upon several requests made to the accused, the accused reluctantly opened P21 for SP4 to inspect the contents. According to SP4, the accused was rather furious over the request to open P21 for inspection.

G **[8]** SP4 found four pairs of women's shoes in wedge design. Three pairs in blue ('P22'–'P27') and a pair in black ('P28' and 'P29'). She lifted the shoes and found they were rather unusually heavy.

[9] SP4 told SP6 of her discovery of the suspicious image and women's H shoes which were unusually heavy. SP6 inspected the women's shoes, and he also found them to be unusually heavy.

[10] SP4 instructed the accused to bring the women's shoes to the scanner machine for scanning. The accused was accompanied by SP6 to the scanner I machine. The scanning revealed there was a dark image in all the shoes' heel, and there could be something inside.

[11] After the scanning completed, SP4 instructed the accused to place the women's shoes (P22–P29) back into P21, and then to place P21 back into P6

as before. She then instructed the accused to wait at a room (*bilik rehat pegawai kastam*) at the complex. A

[12] The accused was accompanied by SP6 to the room. SP6 watched over the accused in the room while waiting for other customs officers from the Narcotics Unit, Alor Setar to arrive. SP6 had earlier contacted his superior, SP8, about the suspicious discovery by SP4 and sought for assistance. B

[13] An hour later, SP8 and a team of customs officers arrived at the complex in Bukit Kayu Hitam. SP4 related to SP8 what she had discovered. SP4 then handed over the accused, P6, P21 and the accused's passport ('P88') to SP8. SP4 and SP6 then resumed their duties at the customs check-point. C

[14] SP8 and his officers took the accused to the customs narcotic office which was within the vicinity of the complex at Bukit Kayu Hitam. D

[15] At the office, SP8 did a random selection of passenger's bags for purposes of inspection. SP8 placed P6 together with seven other bags in a single file. The other seven bags were from other passengers who were at the scene and had volunteered to allow their bags to be inspected. E

[16] SP8 ordered SP7 who came with a drug-sniffing dog named 'Tera' to go through the bags in a single file. Before the inspection was carried out, SP8 had cautioned all the passengers, and they had given their consent to the inspection process. F

[17] SP7 testified that his dog reacted positive to the presence of drug substances in the accused's bag, ie P6. SP8 then ordered his officers to bring the accused (together with P6) back to the narcotic customs office in Alor Setar for further investigation. G

[18] At the narcotic customs office, SP8 carried out a thorough inspection on P6. SP8 found P21 inside P6. Upon emptying P6, SP8 found P6 was rather unusually heavy. He inspected the emptied P6, and he found the side wall was unusually thick. He ripped open the inside wall of P6 and found a packet wrapped in while plastic tape ('P67') containing white crystal substances. H

[19] SP8 also found another packet wrapped in white plastic tape ('P69') containing white crystal substances concealed in P21. SP8 also found concealed inside the heels of the four pairs of women's shoes small packets of plastic which contained white crystal substances as well ('P71', 'P73', 'P75', 'P77', 'P79', 'P81', 'P83', 'P85'). I

[20] SP8 weighed all the packets ('P67', 'P69', 'P71', 'P73', 'P75', 'P77', 'P79', 'P81', 'P83', 'P85') and the weight was 3.329kg.

[21] The table below depicts where the incriminating drugs were found:

Items	Incriminating drugs	Where the incriminating drugs were found
P6 — brown bag	P67	concealed at the side wall of P6
P21 – black bag (P21 was found inside P6)	P69	concealed at the side wall of P21
P22 – blue shoe P23 – blue shoe P24 – blue shoe P25 – blue shoe P26 – blue shoe P27 – blue shoe P28 – black shoe P29 – black shoe (all the womens shoes were found inside P21)	P71, P73, P75, P77, P79, P81, P83, P85	concealed in the heels of the women's shoes

[22] The entire inspection took two hours to complete. SP8 then prepared a search list ('P99'), he signed on each page of the search list and it was counter signed by the accused. SP8 also lodged a police report BKT K_HITAM/001635/14 ('P101'). He prepared a sketch plan of the place of incident ('P89'). SP8 also prepared a *borang serahan kes* ('P100').

[23] SP8 handed over the accused and all the items listed in P99 to the investigating officer, SP10. He also handed over P99, P100, P101 and P89 to SP10 for his further investigation.

[24] During the inspection, SP2 was instructed to take photographs of the items found in P6 and P21 (see 'P61(1–24)').

[25] SP10 had ordered the accused to go through a fitting test. Photographs were taken during the fitting test. Upon completion of the fitting test, SP10 kept all the items handed to him in a metal cabinet kept in his office, and only SP10 had access to the metal cabinet.

[26] On 7 August 2014, around 2.30pm, SP10 removed P67, P69, P71, P73, P75, P77, P79, P81, P83 and P85 from the metal cabinet and placed

them in a box marked 'J' ('P57'), and they were sent for analysis. During the process of packing, SP2 was instructed to take photographs (see 'P62(A–D)'). A

[27] It is noted that all the photographs ('P61(1–24)' and 'P62(A–D)') taken by SP2 were copied into a CD. The CD was tendered in court and marked as P60 via SP2. B

[28] SP10 brought P57 to the Jabatan Kimia Malaysia, Alor Setar Branch and handed P57 to the chemist, SP3, for analysis (see letter *Permohonan Analisa Hablur Kristal Putih Disyaki Dadah Jenis Syabu* dated 7 August 2014 — 'P64'). SP3 issued an acknowledge receipt ('P65') of P57–SP10. C

[29] On 17 August 2014, SP3 began her analysis of the contents in P57. She detailed her examination and analysis process in her witness statement ('P63'), particularly in paras 18–26. She found the crystal white substances in P67, P69, P71, P73, P75, P77, P79, P81, P83 and P85 were methamphetamine in nature which is a substance listed in the First Schedule of the DDA. SP3 had detailed the nett weigh of the methamphetamine found in each of the packets in her chemist report 14-FR-K-02780 dated 10 November 2014 ('P66'). After the analysis, SP3 placed all the items back into P57. D E

[30] On 11 December 2014, SP3 returned P57 (together with the exhibits) to SP10. She also handed her chemist report (P66) to SP10. On the same day, upon receipt of P57, SP10 forwarded P57 and all the items seized from the accused which were kept in his metal cabinet to the customs storekeeper, SP1, for safe keeping (see *Borang Penyerahan Barang-Barang* — 'P3'). F

[31] Earlier, on 11 August 2014, SP10 and his officers escorted the accused to Pejabat Kesihatan Daerah Kota Setar to draw a blood sample for DNA testing for the purposes of matching the DNA found in the clothes kept in P6. SP10 took the blood sample ('P96') and randomly selected a pair of jeans ('P94B'/'Ala') and a T-shirt ('P95B'/'Ald') for DNA match. G

[32] On the same day, SP10 delivered P96, P94B and P95B to the Science Officer, SP5, in Pulau Pinang (see letter *Permohonan Pengesanan DNA pada Ekshibit* dated 11 August 2014 — 'P91'). SP5 issued an acknowledgement receipt ('P92') of the items to SP10. H

[33] SP5 carried out her DNA analysis, and the DNA analysis was detailed in her witness statement ('P90'). Her results showed that the pair of jeans contained the accused's DNA, but not the t-shirt. The result also showed that there are two more unknown person's DNA found on the jeans beside the accused (see para 22 of P90). I

[34] On 26 November 2014, SP5 returned P96, P94B and P95B to SP10 together with her chemist report No Makmal 14-FR-P-06065 dated 17 November 2014 ('P93').

[35] On the same day, SP10 forwarded P96, P94B and P95B to the customs storekeeper, SP1, for safe keeping (see *Borang Penyerahan Barang-Barang* — 'P2').

[36] On 10 October 2015, SP10 received a promotion and was ordered to be transferred to the enforcement unit in Pulau Pinang. On 19 October 2015, he handed the case to SP9 for further investigation.

[37] Before the case was handed over to SP9, and during the course of investigation, SP10 had requested a manifest from AirAsia pertaining to the accused's flight schedule. One Azrin Razman bin Suleiman from AirAsia had provided two manifests showing the flight schedules of the accused (see exhs P104, P105A, P105B, and P106).

[38] The manifests revealed that on 3 August 2014, the accused departed from Medan, Indonesia, on Flight 124 (KNO–KUL) and arrived at KLIA (see 'P105A'). He then boarded Flight 316 (KUL–DMK) from KLIA to Bangkok on the same day.

[39] According to P18, the accused's travel itinerary document which was seized from the accused by SP8, shows that the accused was to travel to Bangkok from Medan via KLIA on 3 August 2014, and the accused was to depart from Bangkok to Medan on a direct flight No QZ155 on 20 August 2014.

[40] Coming back to SP10's investigation, SP10 attempted to obtain the CCTV recording at the immigration check-point on the day the accused arrived and also the imaging of the scan. However, he was told by Muhamad Marzuki, SD2, that the CCTV was not functioning, and with regard to the imaging, he was told by customs officer Wan Sehari that the CPU was not functioning, therefore, could not store any capture image in the CPU.

[41] SP10 told the court that the recording statement of the accused was not helpful in his investigation, and he did not conduct any further investigation

[42] SP9 took over the case from SP10 on 19 October 2015. However, on 9 November 2015, SP9 was assigned to another department. As such, on 16 November 2015 he handed the case to SP11. While the case was with SP9, he did not carry out any further investigation.

[43] SP11 took over the case from SP9 on 16 November 2015. SP11 told the court that he received a letter from the accused's lawyer Messrs Gooi & Azura dated 8 June 2016 ('D1') requesting that he calls the foreign phone numbers found in the accused's handphone that was seized. SP11 attempted to do so. However, his calls were futile because the lines were inactive. He contacted the Indonesia drugs enforcement agency to check on the phone numbers and was told that the numbers were inactive. He then checked with the narcotic helpdesk, but there was still no reply.

[44] On 25 July 2016, SP11 removed all the exhibits from the customs store and brought them to court (see *Borang Mendapatkan Barang Kes Untuk Dibawa ke Mahkamah* dated 25 July 2016 — 'P5').

[45] The prosecution closed its case after SP11 gave evidence. The above is the gist of the prosecution's case.

AT THE CLOSE OF PROSECUTION'S CASE

[46] At the close of the prosecution's case, this court had carried out a maximum evaluation of the evidence adduced by the prosecution. The court found the prosecution had made out a prima facie case against the accused on the offence charged. The reasons for the finding are as below.

[47] Firstly, the accused was seen carrying with him P6 at the immigration check-point at the immigration complex, Bukit Kayu Hitam. P6 was positively identified as the bag which was carried by the accused by SP4 who had instructed the accused to place P6 for scanning.

[48] Secondly, P21 was found inside P6, and the women's shoes were found in P21. The accused himself removed P21 from P6. The accused himself told SP4 there were women's shoes in P21.

[49] Thirdly, SP6 had witnessed too that P6 and P21 were with the accused at that material time, and that the women's shoes were kept inside P21. The incriminating drugs were found concealed in P6, P21 and the women's shoes (P22–P29). Clearly, from the prosecution's evidence, the accused was in close proximity to the incriminating drugs which were kept in P6, P21 and P22–P29. This fact could make out a strong inference that the accused was in *custody* of the incriminating drugs.

[50] Fourthly, the fact that the accused was in custody of P6 and P21 and the contents therein, an inference could be made out that the accused could have the power to deal with the incriminating drugs as owner to the exclusion of all

other persons, and when the circumstances were such that he might be presumed to intend to do so in case of need. This fact could establish that the accused had full *control* over the incriminating drugs.

[51] Fifthly, the accused was found to have had in his custody and under his control P6, P21 and P22–P29 which containing the incriminating drugs, and pursuant to s 37(d) of the DDA, until the contrary is proved, the accused shall be deemed to have been in possession of such incriminating drugs and shall, until the contrary is proved, be deemed to have known the nature of such incriminating drugs.

[52] Sixthly, the accused was caught in the act of carrying P6, P21 and P22–P29 where the incriminating drugs were found being concealed, and the act of carrying is defined in s 2 of the DDA to include within the definition of 'trafficking'. The total weight of the incriminating drugs is 2,081.84g which is way above the weight that an inference could be made out for own consumption of the accused. Further, the concealed incriminating drugs was an overt act sufficient to infer as an act of trafficking. Based on these findings, this court was satisfied that the accused was in fact in the act of trafficking as envisaged in the definition of s 2 of the DDA.

[53] Seventhly, the testimony of SP3 confirmed that the crystal white substances found inside P67, P69, P71, P73, P75, P77, P79, P81, P83 and P85 were methamphetamine which is listed in Part III, First Schedule of the DDA. The substance and the total weight of the methamphetamine was not challenged in the prosecution's case.

[54] Lastly, this court had considered carefully the movement of the exhibits of the incriminating drugs in the prosecution's case, and this court found there was no gap in the chain of evidence of these exhibits.

[55] Based on the above findings, this court found the prosecution had made out a prima facie case which is explained in s 180(4) of the Criminal Procedure Code, and pursuant to s 180(3) of the same Code, this court called upon the accused to enter his defence.

THE DEFENCE CASE

[56] The accused elected to give evidence under oath after his rights were explained to him in the language which he was familiar with which was Indonesia Acheh through a court appointed interpreter Encik Made Jakfar Abdullah.

[57] The accused's narrative was that back in Indonesia in his hometown he was offered a job by his friend named Iwan to travel to Bangkok to bring back some samples of children's clothing and shoes which he had ordered, and at the same time to source for samples of *baju melayu*. The accused told the court that Iwan was in clothing business.

[58] The accused accepted the offer. The instruction to him was to go Bangkok and meet with a person by the name of Dedi, and Dedi will hand over some samples of children's clothing and shoes to the accused. He was also instructed to travel to Hat Yai and Chiang Mai to source for more clothing samples. The accused told the court that Iwan will send some sample photos of the clothes' designs via handphone to him while he is in Thailand.

[59] Iwan introduced one April Naldi to the accused before he left for Bangkok. April Naldi was asked by Iwan to arrange for the accused's passport to travel to Bangkok. At the same time, April Naldi gave his ATM card ('P42') to the accused in case he needed any cash to use on his journey in Bangkok.

[60] On 3 August 2014, the accused arrived in Bangkok. He checked in to a hotel booked by Iwan, but he could not remember the name of the hotel. On the following day, Iwan contacted the accused and informed him that Dedi will be seeing him and to pass him some samples of children's clothing and shoes.

[61] After Iwan contacted the accused, Dedi came and brought along a bag containing children's clothing and a smaller bag containing women's shoes. The accused could not identify and confirm P6 and P21 were the two bags handed to him by Dedi. Dedi suggested to the accused that he should place his own clothes in the same bag so that he could easily travel around. The accused followed Dedi's suggestion, and he then travelled to Hat Yai the next day with the bag brought by Dedi. The accused was instructed to go Hat Yai by Iwan.

[62] The accused travelled to Hat Yai from Bangkok by bus. When the accused reached Hat Yai, Iwan sent some photos of sample clothing to him. While the accused was in Hat Yai, he received a phone call from his brother who stayed in Kuala Lumpur. The accused's brother, Dani, told the accused that he would like to meet the accused in Kuala Lumpur.

[63] The accused then informed Iwan that he would like to travel to Kuala Lumpur to meet his brother. Iwan granted the accused permission to go to Kuala Lumpur to see his brother, said the accused.

[64] The accused bought a bus ticket from Hat Yai to go to Kuala Lumpur. He arrived at the Immigration Complex in Bukit Kayu Hitam in the afternoon. He was requested to place the bag which he brought along with him

into the scanning machine. The bag which he was carrying belonged to Iwan, said the accused. After the bag was scanned, two customs officers approached him and wanted to inspect the bag.

[65] The customs officers removed all the items from the bag and placed every item into the scanner one by one. The accused told the court that he did not stop the customs officer from inspecting the bag. The accused narrated that after the scanning the customs officers arrested him and told him that they saw suspicious items in the bag from the scanner images.

[66] He was brought into a room. Later a team of customs officers arrived with a dog. The customs officers took his bags and placed his bags with other bags for sniffing by the dog. After that, he was brought to an office where thorough inspection was carried out on the bag. The customs officers found the incriminating drugs concealed in the bag ('P6') and the smaller bag ('P21') as well, the accused said.

[67] The accused said he was shocked to know that there were drugs found in the bags and told the customs officers that the bags belonged to Iwan. The accused also asked for permission to contact Iwan, the owner of the bags. The accused said that the customs officer did not respond to his request.

[68] The accused said that he did not admit the bags were his nor did he admit that the crystal white substances were 'syabu'.

[69] The accused told the court that he informed SP10 that the bags belonged to Iwan, and Iwan's handphone number was stored in his handphone. But, SP10 did not contact Iwan, the accused said.

[70] The accused also told the court that he did inform SP10 how he obtained the bags in Bangkok and from whom he had received the bags and why he went to Bangkok. He further told the court that he accepted Iwan's offer because he was unemployed. He trusted Iwan and worked for him. After his arrest by the Malaysian authority, he was unable to contact Iwan anymore because he could not remember Iwan's handphone number.

[71] In the defence case, Muhamed Marzuki, SD2, was called to give evidence. In gist, SD2 confirmed that there was no CCTV recording at the Immigration Complex at the material time because the recording was not functioning. The CCTV recording had not been functioning for several months, SD2 said.

EVALUATION OF THE DEFENCE CASE

[72] The accused's main defence was that he was an innocent carrier, ie he had no knowledge that the incriminating drugs were concealed in P6, P21 and P22–P29. These items which the incriminating drugs were found actually belonged to Iwan, the accused's counsel submitted. Iwan was the actual trafficker, not the accused, the accused's counsel further submitted.

[73] The accused's defence necessarily called upon the consideration of the concept of wilful blindness, and this concept has been repeatedly ventilated and applied in the jurisprudence of Malaysian criminal law, particularly in cases of drug trafficking (see recent decisions of the Court of Appeal in *Deon Jacobus Alfred Cornelius v Public Prosecutor* [2016] MLJU 1564; [2016] 1 LNS 354 at para 15; *Mohamed Hasrool bin Mohamed Najri v Public Prosecutor* [2016] MLJU 1562; [2016] 1 LNS 300; *Saied Zoujhi Eisa v Public Prosecutor* [2016] MLJU 1563; [2016] 1 LNS 301; *Ismayilova Namid Qizi Irada v Public Prosecutor* [2016] MLJU 1565; [2016] 1 LNS 20; and *Marimuthu a/l Seringan v Public Prosecutor* [2016] MLJU 1561; [2016] 1 LNS 64).

[74] The Court of Appeal in *Saied Zoujhi Eisa* referred to *R v Briscoe* 2010 SCC 13 in relation to the concept of wilful blindness and its application. At para 24, it stated as follows:

> [24] The doctrine of wilful blindness have been applied by the superior courts in many cases in Malaysia. This doctrine has been explained by Charron J in the Supreme Court of Canada in the case of *R v Briscoe* 2010 SCC 13, where he said that:
>
> > [21] ... The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries. See *Sansregret v The Queen* [1985] 1 SCR 570, and *R v Jorgensen* [1995] 4 SCR 55. As Sopinka J succinctly put it in Jorgensen (at para 103), '[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?'
> >
> > [22] ... As the Court explained in *Sansregret* (at p 584):
> >
> > > ...wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant ... in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.
> >
> > [23] ... The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law ... A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. *He*

A *suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness.* It requires in effect a finding that the defendant intended to cheat the administration of justice. (Emphasis added.)

B **[75]** It is trite law that mere ignorance simpliciter would be insufficient for an accused to raise in his defence. Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination (see *Hoh Bon Tong v Public Prosecutor* [2010] MLJU 2184; [2010] 5 CLJ 240 at p 273).

C **[76]** The above authorities prompted this court to ask this question: Whether the accused suspected the fact that the incriminating drugs were hidden in P6, P21 and P22–P29, and whether he could have realised the probability, and yet, he refrained from obtaining the final confirmation?

D **[77]** According to the testimony of SP4, she found the women's shoes (P22–P29) were rather unusually heavy. Likewise, SP8 found the emptied P6 was rather unusually heavy during his inspection of the bag. Could the rather unusually heavy women's shoes and P6 have prompted the accused to suspect
E something when he received the items from Dedi in Bangkok? This question is rather subjective. The accused may not know how heavy women's shoes are, especially shoes with a wedge design. The chunky heel design looks heavy from a man's point of view. Hence, P22–P29 could be heavy even by their normal weigh.

F **[78]** With regard to the emptied P6, when the accused received P6 from Dedi, P21 already contained the women's shoes, and P21 were placed inside P6. Hence, the accused would not know how heavy P6 would be if emptied.
G He did not empty P6 to check. It would be unusual for a person to empty a bag to ensure its weight after he had received it, especially if it contains items in it. Hence, the accused might not have suspected anything unusual when he received P6 from Dedi.

H **[79]** The learned deputy public prosecutor challenged the accused that it would not make sense why Iwan would want to send the accused all the way to Bangkok just to bring back the samples of children's clothing and women's shoes. The costs would be much cheaper if those sample items were to send by post from Bangkok to Medan, instead of paying the accused's expenses to fly
I him there and come back. This argument may have certain degree of truth. However, the accused's narrative was that he was asked to go Bangkok not just to take the samples back to Medan, he was also asked to source for other samples of clothing in Hat Yai and Chiang Mai. For this reason, it would not raise any suspicious circumstances that the items the accused was carrying had

incriminating drugs concealed in them. The accused was supposed to get other samples of clothing from Hat Yai or Chiang Mai too.

[80] SP8 agreed that P6 looked normal. This could be a fact that it did not cross the mind of the accused that there could be something hidden in P6. The weight and look of P6 did not raise the suspicions of the accused. If the accused did not suspect anything wrong from the outset, he would not have asked or inspected P6, P21 and P22–P29 although he had the opportunity to ask and carry out an inspection or had the chance to examine the items.

[81] The learned deputy public prosecutor raised the question that the accused ought to feel suspicious when he received P6 from Dedi since he had not met Dedi before. The accused told the court that he did not feel anything unusual because he was instructed by Iwan to meet this person by the name of Dedi, and was told that Dedi will pass him some samples of clothing. The accused also told the court that he trusted Iwan, because he knew Iwan for many years. He took up Iwan's offer because he was unemployed for five years and needed money, the accused said.

[82] Iwan agreed to pay the accused Indonesian Rupiah 2m (approximately RM650) for the job. If someone is poor, and a job was offered to him by someone whom has known for many years, the person would accept the job without question and would definitely feel grateful. Why would he question who Dedi was, and why should the accused feel suspicious of Dedi passing P6 to him despite him not knowing who Dedi was? The accused was merely carrying out what he was instructed to do by Iwan. Receiving P6 with the contents therein was the purpose of his trip to Bangkok.

[83] What other fact could there be for the accused to suspect the incriminating drugs were hidden in P6, P21 and P22–P29 other than those facts which have already been discussed above. This court is of the considered view that there was insufficient evidence to show that the accused could have suspected the fact that incriminating drugs were hidden in P6, P21 and P22–P29, and yet the accused refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. In the absence of any evidence that could infer the accused could have suspected the incriminating drugs hidden in P6, P21 and P22–P29, therefore, the accused could not have asked further, or inspected or examined P6, P21 and P22–P29.

[84] Based on the above, the accused's plea that he was an innocent carrier had been made out. The dependence on the principle of wilful blindness could not sustain in the prosecution's case when it is examined in light of the defence's narrative. This court had also considered other factors as below.

[85] The learned deputy public prosecutor submitted that the accused had raised an afterthought defence which is tantamount to bare denial. This court could not accept the submission. In the entire prosecution's case, the defence's narrative had been put to the prosecution's witnesses, especially to SP8 and SP10. Of course, SP8 and SP10 had answered in the negative to all the questions put to them pertaining to the defence's narrative. This court refers to the contents in D1 which is the letter dated 8 June 2016 from the accused's firm of solicitors, Messrs Gooi & Azura to the deputy public prosecutor.

[86] D1 was written before the trial started. The accused's narrative was clearly stated in the letter. The names Iwan and Dedi were mentioned, and the accused pleaded to the authority to investigate further concerning these two characters. Further, the letter stated that the phone number of Iwan was stored in the accused's phone, and the identity of Iwan was tagged/named with the symbol '?' in the accused's phone. The accused also pleaded that he was being used by Iwan, he was merely an 'innocent carrier'. All these statements justify that the accused's narrative could not be an afterthought defence nor was it a bare denial. SP11 confirmed that his investigation of the phone numbers provided by the accused to locate Iwan was incomplete, because there was no reply from the relevant sources which he had contacted.

[87] Flowing from the above, the learned deputy public prosecutor submitted that all the characters mentioned in the accused's narrative, namely, Iwan, Dedi, April Nadi and even the accused's brother, Dani were not called to give evidence in the defence's case. The learned deputy public prosecutor urged this court to make a finding of fact that these are all fictitious characters raised by the accused, and that the burden was on the accused to call these characters to support his defence.

[88] This court is not ready to make such finding because, firstly, the accused had without hesitation described the physical appearances of these characters. Secondly, the accused was firm about the physical appearances of Iwan and April Nadi when asked to describe them. Thirdly, the accused told the court that his brother Dani was staying in Klang for almost three years. He was not sure the exact location. The accused also told the court he was not sure whether his brother entered Malaysia legally or not. Dani will not expose himself in court if he is an illegal immigrant. Further, the accused told the court that his brother did not know that he was arrested by the authority. Lastly, with regard to why Iwan and April Nadi did not come to give evidence, this court finds if Iwan and April Nadi were the masterminds of the drug trafficking, certainly, they would not come to court to give evidence to support that the accused was innocent. SP11 said he could not locate them; the accused could not be expected to locate them while he was under confinement.

[89] Although it is not the duty of the prosecution to call Iwan, April Nadi, Dedi or Dani, the legal burden remains throughout the prosecution's case to prove the guilt of the accused. If the accused is able to explain why these characters were not called to give evidence, and the explanation is reasonable, then the accused would discharge the burden resting upon his defence. This court finds the accused had discharged that burden.

[90] Most of the time, an arrested person being arrested in a foreign land would be left alone to defend his innocence. The duty to ensure the arrested person is not charged for an offence he did not commit rests upon the investigating officer.

[91] The investigating officer has to investigate all angles thoroughly to ensure the arrested person's guilt is almost certain. The investigating officer cannot carry out a haphazard investigation, especially if the matter involves capital offences which carry a death sentence if convicted.

[92] In this instant case, SP10 denied that he was told by the accused that he was used by Iwan and that the contents found in P6 belonged to Iwan. With regard to the question why April Nadi's ATM card was with him, the accused answered that April Nadi gave him the ATM card under the instruction of Iwan.

[93] From SP10's testimony, SP10 said he did not extract any information from the accused's handphone, and he did not check with the bank (Bank Central Asia, Indonesia) that issued the ATM card ('P42') whether April Nadi's ATM card was a stolen card. If he had investigated, he would find out whose ATM card it was and whether or not the ATM card was a stolen card. This would confirm or refute the accused's story that April Nadi gave the ATM card to the accused. An ATM card surely has an account holder. From there, the investigating officer would be able to determine whether April Nadi is a fictitious person or not, or whether April Nadi knew such a person by the name of Iwan in Indonesia or even the accused.

[94] If SP10 had checked with the bank, he would be able to determine whether the accused's story warranted further investigation that the accused could be innocent. It would have been easy for SP10 to contact a financial institution in Indonesia.

[95] If the phone had been sent to a forensic department, SP10 would have been able to extract more information so to determine the veracity of the accused's story. SP10 did not do so. SP10 did not investigate the registered SIM card in the phone with the foreign telco as well. SP10 was of the opinion that the information in the phone could not provide any lead to his investigation.

[96] SP10 also of the opinion that any information from the phone or the ATM card had nothing to do with the case. This court could not agree with SP10's opinion. If he had contacted the bank, he would be able to verify whether such person Arpril Nadi had anything to do with the case, and whether the accused could be telling the truth. SP11, the later investigating officer, after having received D1, checked the phone numbers and tried to verify the numbers, but did not get any reply from the relevant party. SP10 agreed that the investigation was incomplete.

[97] With regard to the accused's reaction when requested to scan and inspect P6 at the immigration check-point, SP4 told the court that the accused was furious over the request. However, that was challenged by the accused's counsel. The prosecution did not counter that challenge by adduced further evidence.

[98] With regard to the CCTV, if there was a recording, it would help to ascertain what actually transpired that day at the customs check-point at the immigration complex.

[99] This court observed that both SP4 and SP10 testified that there were no price tags on the children's clothing and women's shoes; whereas, SP6 said he was not sure. The accused's counsel had challenged their evidence. This court, upon close inspection of the items, observed that four out of the six children clothes have price tags on them. They are exhs P12, P14, P16 and P17. With regard to the women's shoes, this Court observed that three out of the four pairs have price tags on them. They are exhs P22, P23, P24, P25, P26 and P27. Only P28 and P29 (the black pair) do not have a price tag. This shows that the investigation carried out by SP10 was not detailed enough because the exhs P22–P27 were the shoes where some of the incriminating drugs were found inside the heels. The discrepancy in the description of exh P22–P27 goes to the identity of the items in which some of the incriminating drugs were found concealed.

[100] As a final note, there is one point which this court desires to highlight. The accused gave the reason as to why he came to Malaysia — it was to meet his brother, and that he had sought the permission of Iwan. Iwan gave his permission. The court is prompted to ask why Iwan would allow the accused to bring along P6, P21 and P22–P29 to Malaysia if Iwan knew there were incriminating drugs hidden in them? The original plan was for the accused to fly back to Medan from Bangkok on 20 August 2014. The accused going to Kuala Lumpur was not part of the itinerary. It was strange that Iwan did not instruct the accused to leave the bags and the contents behind if he knew that there could be a risk that the incriminating drugs could be discovered at the Malaysian immigration check-point. This calls the veracity of the accused's

narrative into question. Despite having that reservation, I have evaluated the totality of the accused's narrative in light of the prosecution's case, and concluded that the outcome of the analysis of the accused's case as discussed earlier outweighs my reservation.

[101] After having evaluated and examined carefully all the evidence adduced before this court, there is a reasonable doubt in my mind of the prosecution's case. Conceivably, the prosecution has not proved its case up to the standard as required in law which is the standard of beyond reasonable doubt.

CONCLUSION

[102] Based on the above analysis, this court finds that the accused has succeeded in rebutting the statutory presumption (s 37(d) of the DDA) which was invoked against him. In other words, the accused has on a balance of probabilities convinced this court that he had no knowledge of the existence of the incriminating drugs found in P6, P21 and P22–P29, and therefore, he had no knowledge that the nature of the crystal substances are methamphetamine. In turn, the accused has disproved the element of possession in the prosecution's case.

[103] The element of possession is an essential ingredient for a conviction for the offence charged, ie s 39B(1)(a) — trafficking a dangerous drug. The incriminating drugs were found in P6, P21 and P22–P29 which were found in the accused's custody and that could establish he was indeed a mere 'innocent carrier'. This court finds that the accused had no knowledge of the existence of the incriminating drugs that were in his custody. This court also finds the principle of wilful blindness was not helpful in the prosecution's submission as discussed above.

[104] After having examined the prosecution's case in light of the defence narrative and also after having examined and considered all the evidence in totality, this court finds that the prosecution has failed to prove beyond reasonable doubt its case as per the requirements pursuant to s 182A(2) of the CPC in that the accused had committed the offence charged. Hence, pursuant to s 182A(3) of the CPC, I hereby order that the accused be forthwith discharged and acquitted from the charge against him.

Accused discharged and acquitted.

Reported by Dzulqarnain Ab Fatar